1990

State of Utah v. Gregory J. Marshall : Petition for Writ of Certiorari

Utah Supreme Court

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BRIEF
DOCKET NO. 900238

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
	:	
Plaintiff/Cross-Respondent,	:	
	:	Case No. 890121-CA
vs.	:	
	:	Category No. 13
GREGORY J. MARSHALL,	:	
	:	900238
Defendant/Cross-Petitioner,	:	

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UTAH COURT OF APPEALS

CROSS PETITION FOR WRIT OF CERTIORARI TO THE UTAH COURT OF APPEALS REVERSING THE TRIAL COURT'S DENIAL OF DEFENDANT'S MOTION TO SUPPRESS AND REMANDING FOR FURTHER PROCEEDINGS EVIDENCE IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR SEVIER COUNTY, DONALD V. TIBBS, JUDGE PRESIDING.

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IN THE SUPREME COURT OF THE STATE OF UTAH

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals had any legal basis to rehear the case after having made its decision on December 26, 1989.

2. Whether the Court of Appeals erroneously remanded the case for further proceedings and in doing so rendered an inconsistent opinion thereby allowing an issue waived by the Cross-Respondent to be examined, for the first time, in the Court of Appeals.

3. Whether the Court of Appeals erred in its ruling that the detention of the Cross-Petitioner was constitutional.

4. Whether the Court of Appeals erred in its ruling that the stop of the Cross-Petitioner was lawful.

5. If consent is found by this Court, the lower court erred in the failing to reach the issue of whether the consent was exploited from the illegal stop and/or detention which was not sufficiently distinguishable from the prior illegality to render the evidence admissible.

OPINION BELOW

This opinion below is the amended opinion of the Utah Court of Appeals issued on April 18, 1990, in *State v. Marshall*, 132 Utah Adv. Rptr. 45 (Ut. Ct. App. 1990) (*See* Addendum A for the text of the decision).

JURISDICTION OF THIS COURT

This is a cross petition for *Writ of Certiorari* to the Utah Court of Appeals which reversed the trial court's denial of defendant's motion to suppress evidence and which remanded the matter to the district court for further evidentiary hearing. Cross/Respondent petitioned for *Writ of Certiorari* on May 18, 1990. By order dated May 15, 1990, Cross-Petitioner was granted an extension of time to file its petition for *Writ of Certiorari* to May 31, 1990. This Court has jurisdiction to hear this petition pursuant to *Utah Code Ann.* § 78-2-2(3)(a) (Supp. 1989) and § 78-2a-4 (1987).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The text of all constitutional provisions, statutes, Rules and Regulations controlling in this matter are included in Addendum C attached hereto.

STATEMENT OF THE CASE

Defendant, Gregory J. Marshall, was charged with possession of a controlled substance (marijuana), a second degree felony, in violation of *Utah Code Ann.* § 58-37-8 (1990) (R. 2). Before trial, defendant moved to suppress the evidence (R. 23-24). The motion was denied (R. 54-55). Defendant filed an interlocutory appeal to the Utah Court of Appeals (R. 91, 187).

On December 26, 1989, the Court of Appeals reversed the trial court's

denial of the Defendant's motion to suppress on the basis that "Mr. Marshall did not consent to the search of the locked suitcases found in the trunk of his vehicle" (footnote omitted) (*State v. Marshall*, 124 Utah Adv. Rptr. 59 at 65, Addendum B). (Utah Ct. App. 1989) The State petitioned for rehearing which was granted. On April 18, 1990, the Court of Appeals issued its amended opinion. The court's amended opinion reversed the trial court's denial of the motion to suppress but also remanded the case for rehearing:

> ". . . on the limited issues of whether Mr. Marshall voluntarily consented to the search of the trunk or the suitcases, whether Mr. Marshall abandoned any privacy interest in the suitcases and thus lacks standing to challenge their search, and finally, if the trial court finds there was an illegal search of the truck or suitcases, whether there is a sufficient nexus between that illegal search and Mr. Marshall's abandonment, if any, of his expectation of privacy in the suitcases"

(Addendum A, *State v. Marshall*, 132 Utah Adv. Rptr. 45 at 50-51)

STATEMENT OF THE FACTS

According to the testimony of the arresting officer, on April 25, 1988, he stopped the vehicle of the Cross-Petitioner, travelling east bound on I-70 after it (the vehicle) had passed a motor home (R.56) [This is the page following page 56, to which the clerk omitted giving a number]. The officer has repeatedly testified that the reason he stopped the vehicle was because the Cross-Petitioner had left his turn signal on for approximately two miles, which the officer considered to be a violation of the Utah State Law (R.56). It was his intent, at the time he stopped the vehicle, to advise the operator of the turn signal problem (D.1,p.15, l.10)

(T.1.p.8;l.18-21).[1]

Upon making contact with the driver, the officer testified that he informed the Cross-Petitioner that his turn signal had been left on and proceeded to conduct a further investigation. In the course of this detention and prior to obtaining any "alleged consent" to search the vehicle, the officer became suspicious that there may be drug activity based upon the application of a "drug courier profile". In support of the officer's suspicion, he stated that:

a. Before the stop, he noticed the following:

1. That the vehicle had out-of-state license plates from California (R.57) (T.1.p.13;l.8-12 and T.1.p.10;l.6-10).

2. He acknowledged that, in his experience, a car traveling east may indicate that the car is carrying drugs and a car traveling west might be more likely carrying money (R.57) (T.1.p.11;l.1-4).

3. He also noticed, prior to stopping the vehicle, that there was one male individual in the vehicle who could be seen and that, in his experience, it was more likely that a male would be carrying drugs than a female (R.57) (T.1.p.11;1.12-25 and T.1.p.12;l.1-13).

b. Upon making contact with Cross-Petitioner, the officer noticed and commented on the following:

1. That the driver had an "eastern" accent (R.57) (T.1.p.12:l.24-25 and

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[1]. The record in this matter includes the testimony of Trooper Dennis Avery of the Utah Highway Patrol at the Suppression Hearing, (T.1); the Preliminary Hearing (T.2); and his deposition in a related matter (D.1), that is, *State of Utah v. One Thousand One Hundred Ninety Seven Dollars in United States Currency*, Case No. 10246, a forfeiture action presently pending before the 6th Judicial District Court in and for Sevier County, State of Utah.

T.1.p.13;l.1) and that he produced a New York driver's license.

2. He indicated that the fact the individual was obviously from New York and was driving an automobile rented in California aroused his suspicions (R.57-58) (T.1.p.13;l.8-12).

3. The other information he noticed during the course of his investigation that raised his suspicion was that there was one small, red bag, a can of "Fix-a-Flat", a CB radio, and a steering wheel locking device in the front seat area of the vehicle (R.58) (T.1.p.13;l.21-25 and T.1.p.14;l.1-2). The fact that he could see no other luggage in the vehicle and just the one small bag was suspicious to the officer even though at that point he did not know if there was luggage in the trunk (R.58) (T.1.p.14;l.3-10).

4. The officer also stated that Cross-Petitioner avoided eye contact with him and seemed to be somewhat nervous (R.58) (T.1.p.30;l.16-25 and D.1.p.53;l.11).

5. The officer further testified that he asked Cross-Petitioner for the vehicle rental agreement which he examined, indicating that the car was to be turned into a different location than the Cross-Petitioner told him where he was possibly going to return the vehicle. Nevertheless, the officer acknowledged that at the bottom of the rental agreement it showed that the car didn't necessarily have to be returned to the destination that was stated (R.58) (T.1.p.14;l.17-25 and T.1.p.15;l.1-17).

Based on the foregoing observations and prior to asking the Cross-Petitioner if he could "look in the vehicle" (R.59) (T.1.p.22;l.11-15), the officer testified that he determined he would get a search warrant to search for controlled substances even though there was no apparent evidence of controlled substances in the

interior of the car or any other evidence of illegal activity (R.59) (T.1.p.15;l.19-25 and T.1.p.20;l.14-19).

After issuing the warning citation and while Cross-Petitioner was seated in the officer's patrol car, the officer proceeded to question Cross-Petitioner (R.59) (T.1.p.20;l.20-25). He did not advise Cross-Petitioner that he was free to leave after he gave him back his driver's license, registration and warning citation (R.59) (T.p.21;l.2-13). The officer further testified that although Cross-Petitioner was free to leave, if Cross-Petitioner had tried to leave, he would have found it to be more suspicious activity and would have stopped him (R.59) (T.1.p.21;l.14-18 and T.1.p.22;l.22-25 to p.23;l.1-2).

The officer thereafter questioned Cross-Petitioner as to whether he was carrying certain items such as firearms, drugs or alcohol (R.59) (T.1.p.22;l.6-9). After receiving the Cross-Petitioner's response he asked if he could, "Look in the vehicle." (R.59) (T.1.p.22;l.11-15). Mr. Marshall acquiesced to the officer's request to "look in the vehicle" whereupon the officer examined the passenger compartment of the vehicle, including the red bag which Cross-Petitioner had in the front seat.

After searching the interior of the vehicle and its contents and finding no indication of contraband, the officer asked the Cross-Petitioner "if he had a key" (to the trunk) and "if he would open it" (R.60) (T.1.p.27;l.12-14).

Inside the trunk were four bags which the officer proceeded to search. He claims he found a green/leafy substance in one of the bags. The bags were padlocked at the time and the bag in which the green/leafy substance was found had to be broken open to be searched.

POINT I

THE COURT OF APPEALS HAD NO LEGAL BASIS TO REHEAR THE CASE AND MODIFY ITS DECISION FROM DECEMBER 26, 1989.

The Court of Appeals initially made its decision in this matter on December 26, 1989. Pursuant to Rule 35 of the *Rules of the Utah Court of Appeals*, the rule governing rehearing, "a petition for rehearing must state with particularity the points of law or fact which the petitioner claims the Court has overlooked or misapprehended." Case law establishes that a rehearing is only warranted on those grounds. *See e.g. Cummings v. Nielsen*, 42 Utah 157, 172-173, 129 P. 619, 624 (1913); *Brown v. Pickard*, 4 Utah 292, 11 P. 512 (1886). Since the Respondent sought rehearing, it was the Respondent's burden to establish that the Court erred under either of the above-stated grounds.

Neither the Cross-Respondent's Petition nor the Court of Appeals' Amended Decision establish that any law or facts were overlooked or misapprehended. The Court of Appeals, nevertheless, in its amended opinion, modified its prior ruling and remanded this matter for further proceedings before the trial court, on the basis that the finding below was insufficient. No where in the opinion did the Court of Appeals rule that either of the parties had overlooked or misapprehended facts or law. The facts developed below were sufficient for the Court of Appeals to make its initial determination to overturn the trial court and are sufficient for this Court to make a determination on the present record. The opinion does not evidence that facts were overlooked or misapprehended - it merely confirms that the Cross-Respondent simply did not meet its evidentiary burden. The lower Court did not rule that law was overlooked. Instead, it affirmed its prior legal rulings

with the exception of reserving on the issue of consent. The opinion resulting from the rehearing contradicts the prior opinion by stating that the findings were now found to be insufficient, when they were not in the first instance and are not presently. The Cross-Respondent has never argued to the Court of Appeals that the findings were not sufficient for appellate review. Rehearing was therefore inappropriate.

POINT II

THE COURT OF APPEALS ERRONEOUSLY REMANDED THE CASE FOR FURTHER PROCEEDINGS. IN DOING SO IT RENDERED AN OPINION WHICH WAS INCONSISTENT AND ALLOWED AN ISSUE, WAIVED BY THE CROSS-RESPONDENT IN THE TRIAL COURT, TO BE EXAMINED FOR THE FIRST TIME.

The Court of Appeals' second opinion did not modify any of the legal rulings made on the issues raised on appeal in this case. Despite the Appellate Court's ability to render its first decision based on the findings on the record, that Court subsequently determined that it did not have a sufficient record to decide the issue of consent. Additionally the lower court decided that the issue of abandonment, which was never raised until the appeal, needed to be explored.

> "Upon a re-examination of the record we agree with the State that the parties and the trial judge did not focus on the critical issue of the search of the suitcases at the motion to suppress hearing. The result is that the trial judge did not make adequate findings of fact on the issues of voluntary consent to search the trunk or the suitcases and Mr. Marshall's alleged abandonment of any privacy interest in the suitcases which the parties now agree are pivotal on appeal. We therefore remand for a rehearing on these issues.

State v. Marshall, 132 Utah Adv. Rptr. 45 at 49. (Utah Ct. App. 1990)

Cross-Petitioner asserts that any remand for the purposes of further

proceedings on the record is both unnecessary and improper, given the status of the record in this case.

A. THE LOWER COURT'S FINDINGS WERE SUFFICIENT FOR THE APPELLATE COURT TO DETERMINE THE ISSUE.

The trial judge made a findings of fact that "the defendant consented to the search. There was no evidence of duress or coercion." (R. 89) There is nothing in the lengthy record of this case that would preclude the Court of Appeals from making a determination that that finding was erroneous as they did in the first opinion. All of the facts necessary to determine the legal issues were developed within the record. It is the State's burden to show a warrantless search is lawful. *State v. Christensen*, 676 P.2d 408, 411 (Utah 1984). What that record clearly demonstrates though, is that the State failed to meet its burden of proving there was voluntary consent to search the suitcases, even by a preponderance of the evidence. The lower court's initial ruling that the State had failed to prove consent was appropriate and capable of being rendered from the record. The trial court judge's determination to the contrary was erroneous, and remand for further findings is unnecessary.

B. REMANDING THE CASE FOR FURTHER HEARING IS INAPPROPRIATE.

It is unclear from the lower court's ruling whether the court remanded for further evidentiary hearing. It is clear, however, from the ruling of the court, that the Court of Appeals expected a determination of an issue never presented by the State in the lower court.

> . . . therefore we reverse and remand this interlocutory appeal for rehearing on Mr. Marshall's motion to

> suppress on a limited issues of whether Mr. Marshall voluntarily consented to the search of the trunk or the suitcases, whether Mr. Marshall abandoned any privacy interest in the suitcases and thus lacks standing to challenge their search and finally, if the trial court finds there was an illegal search of the trunk or suitcases, whether there is sufficient nexus between that illegal search and Mr. Marshall's abandonment, if any, of his expectation of privacy in the suitcases."

State v. Marshall, 132 Utah Adv. Rptr. 45 at 50-51 (Utah. Ct. App. 1990)

The Court, in this opinion, was not specific as to whether or not further evidence needed to be taken, which the Cross-Petitioner asserts leaves the matter open inappropriately.

The trial court did not make adequate findings on voluntary consent to search the suitcases, or that there was an inadequate finding as to the abandonment of any privacy issue to justify a remand. As argued to the Appellate Court in its Answer to Petition for Rehearing and Reply Brief to the Respondent's brief, the Respondent did not raise the issue of abandonment in the lower court and it is therefore inappropriate to have directed the lower court to address it now. The only basis ever argued to justify the search was consent. Remanding for a determination of abandonment is inappropriate.

The Court justifies its direction by stating "the parties now agree that issue is pivotal on appeal". That finding by the Court is absolutely erroneous. Cross-Petitioner has persisted in the argument that abandonment, as well as standing, having not been raised as an issue in the trial court, can not, and should not be raised on appeal. This issue was never argued in the trial court, either at the Suppression Hearing or in briefs submitted to the trial court. Consent was all that was relied upon. Cross-Petitioner has consistently relied on the rule that a new

issue cannot be raised on appeal. It is not now, nor has it ever been a pivotal issue to this case. Cross-Petitioner asserts that a remand a determination of that issue in the lower court, when it was neither raised nor argued in the trial court, is inappropriate. The lower court' decision then, if allowed to stand, authorizes consideration anew of an issue not raised below and apparently abandoned by the State before the trial court.

Given the record in this matter, to suggest that any further hearings ought to be conducted in this case, is both patently unfair and improper, particularly when the State's counsel abandoned or conceded the issue below. What the Court of Appeals' amended decision effectively proposes is that the State, having failed to build its record in the trial court and having failed to raise the arguments that they claim the facts may have supported, should be given a chance to correct the record for its own purposes and to the prejudice of the Cross-Petitioner.

C. THE LIMITED ISSUES REMANDED FOR DETERMINATION ARE INAPPROPRIATE.

The lower court remanded the case for hearing on the following limited issues:

First, whether or not Mr. Marshall voluntarily consented to the search of the trunk or the suitcases was erroneous. The trial court made a determination that there was Consent. That determination was not supported by the record, as the initial opinion of the Court of Appeals verifies. Reopening the record and requesting additional findings would not cure that problem.

Cross-Petitioner does not concede that the Court of Appeals' initial determination that the search of the trunk was consensual. The record does not

establish consent.

Legally, the officer was without authority to request the search because it was done so after the warning ticket was issued and there was no other suspicious evidence warranting a detention. *Utah Code Ann.*, § 41-6-167 (1953 as amended) is a forthwith release statute. It provides that the officer is to give written notice to appear on motor vehicle code violations. If the person signs a written promise to appear, and the officer has no reason to believe the individual will not appear or pay the ticket - he is to "forthwith release the person arrested from custody". Failure to do so is a crime. A person stopped and detained for a problem warranting only a warning ticket is certainly entitled to the benefit of that provision. The officer's further questioning of the Cross-Petitioner in this case, was outside his legal authority thereby violating any purported consent.

Additionally, this officer never advised the Cross-Petitioner that he did not have to consent. Cross-Petitioner asserts that Article 1, Section 14 of the Utah Constitution should be interpreted to require informed consent.

Further, Mr. Marshall was directed to open the trunk, not asked. There was, therefore, no factual consent. The State also never established, on the record, that the voluntariness standards of *U.S. v. Abbott*, 546 F.2d 883 (10th Cir. 1977) were met.

The Court of Appeals initially correctly determined that the State had failed to meet its burden of proving any consent in connection with the suitcases. Any consent to the trunk did not encompass the suitcases and was beyond its scope. *U.S. v. Gay*, 774 F.2d 368, 377 (10th Cir. 1985); *People v. Thiret*, 685 P.2d 193, 201 (Colo. 1984)

Second, the Court of Appeals remands for the purposes of determining whether Mr. Marshall abandoned any privacy interest in the suitcases and thereby lacked standing to challenge their search. A remand for that purpose is inconsistent with the Court's ruling in the first part of its opinion where the Court stated that the State should be precluded from raising the issue of standing on appeal because of their failure to raise it in the trial court. It is without logic then to remand this matter so that there can be a trial court proceeding with direction that those issues be developed and addressed. Having failed to raise either abandonment or standing in the trial court, it is not appropriate to remand to the trial court only for the purposes of allowing the State to cure its error.

Third, the remand for a determination as to whether or not there was an illegal search of the trunk or suitcases, and if so, whether there is a sufficient nexus between the illegal search and Mr. Marshall's abandonment, once again, is merely giving the State the opportunity to address an issue which they waived by failing to argue it to the trial court.

The Court of Appeal's decision to remand for further examination of the above-stated issues is not only inconsistent with its ruling on the State's burden to assert standing and prove consent, but effectively establishes a different standard for the State than a defendant in a criminal matter. If the opinion were allowed to stand, this Court would be condoning this double standard. Defendant's cannot raise new issues on appeal, but the State, if they fail to raise issues, is entitled to reopen the trial court record and have a second opportunity.

Further, the opinion ignores the burdens placed on the State when a warrantless search is challenged. The State's failure to take advantage of an

opportunity to argue the issues that they claim the facts may have developed should preclude them from being allowed in a remand situation to go back and attempt to cure any perceived error. This Court can and should determine from the record that the prior Court of Appeals' initial opinion regarding consent to search the suitcases was correct and that the State failed to meet its burden to prove consent otherwise, even by a preponderance of evidence, under applicable case law.

POINT III

THE RULING OF THE COURT OF APPEALS THAT THE DETENTION OF THE CROSS-PETITIONER WAS CONSTITUTIONAL, WAS ERRONEOUS.

In both opinions, the Court of Appeals ruled "we find that Trooper Avery's questioning of Mr. Marshall as to conduct unrelated to the traffic stop was justified because he had reason to believe Mr. Marshall was engaged in a more serious crime." *State v. Marshall*, 132 Utah Adv. Rptr. 45 at 47. This matter involved a stop that was based solely on the failure of a blinker light to turn off within a period of time satisfactory to the officer. The officer, thereupon conducted a fishing expedition before and after a warning ticket was given to the Defendant which was not related to the traffic investigation nor supported by any reasonable suspicion.

Under the Fourth Amendment and applicable Constitution law, even if there is an arguably proper stop of a vehicle for a traffic offense there must be probable cause to detain the individual for investigation beyond the traffic violation. *Terry v. Ohio*, 392 U.S. 1 (1968); *U.S. v. Gonzales*, 763 F.2d 1127 (10th Cir. 1985); *U.S. v. Guzman*, 864 F.2d 1512 (10th Cir. 1988). Recently, in *U.S. v. Walker*,

No. 90-CR-013, (D. Utah 1990) (granting motion to suppress) the United States District Court for the District of Utah ruled that asking questions about alcohol, drugs and firearms, at the conclusion of a traffic investigation, constituted an illegal detention if there was not evidence of the same.

Pursuant to the provisions of the *Utah Code Ann.* § 41-6-162 (1953 as amended), upon signing of an promise to appear, further detention by an officer is illegal. That provision should equally apply in this case, where only a warning citation was issued.

Appellant submits that the criteria relied upon by the officer to validate his detention does not support a finding of probable cause to continue to detain and question the Cross-Appellant about unrelated matters, nor detain for the purposes of requesting a search.

POINT IV

THE RULING OF THE COURT OF APPEALS THAT THE STOP OF THE CROSS-PETITIONER WAS LEGAL WAS ERRONEOUS.

In both its original and amended opinion, the Court of Appeals ruled that the stop of Defendant's vehicle was proper in that the stop was not pretextual and was justified because the officer believed the vehicle's safety equipment was not functioning properly. *State v. Marshall*, 132 Utah Adv. Rptr. 45 at 46-47.

Cross-Appellant submits there was no crime committed in the officer's presence to meet the criteria of *Utah Code Ann.* § 77-7-15 (1953 as amended) - a stop incident to a traffic violation. There exists no statute in the State of Utah which states it is a crime or an offense of any kind to fail to turn off a turn signal. The facts of this case do not support any finding that the turn signal failure in this

case constituted another traffic violation.

Cross-Appellant further submits that Article I Section 1, Article I Section 7, Article I Section 27, and Article I Section 24 of the Utah Constitution, dictate that under the circumstances of this case less intrusive means than a stop and detention were mandated given the fact no statute was or could have been relied upon for the stop.

In both opinions, the Court of Appeals concluded "unlike the officer in *State v. Sierra,* 754 P.2d 792 (Ut. Ct. App. 1988) Trooper Avery was not suspicious of Mr. Marshall for other reasons. . ." The court then concluded that the stop of the Cross-Petitioner was not pretextual. The record is replete with facts that the arresting officer relied on which facts are the same type of improper criteria present in *Sierra, supra.* This improper criteria and the officer's "hunch" validated his continual investigation of the Cross-Petitioner. The finding that the stop was not pretextual and was warranted in both of the Court of Appeals' opinion, is erroneous.

POINT V

IF LEGAL CONSENT IS FOUND THE CONSENT WAS EXPLOITED FROM THE ILLEGAL STOP AND/OR DETENTION AND WAS NOT SUFFICIENTLY DISTINGUISHABLE FROM THE PRIOR ILLEGALITY TO RENDER THE EVIDENCE ADMISSIBLE.

Under *U.S. v. Recalde*, 761 F.2d 1448 at 1457-1458 (10th Cir. 1985), if a consent search results from an illegal stop or detention, the consent must be examined under the following rule:

> In the context of voluntary consent, we hold that 'exploitation of the primary illegality' means that the police used the fruits of the primary illegality to coerce

the defendant into granting his consent.

> We also hold that in the context of voluntary consent, the 'sufficiently distinguishable' standard in *Wong Sun* refers to means of obtaining evidence substantially independent of the prior illegality. *United States v. Carson*, 793 F.2d 1141 at 1149. (10th Cir. 1986)

Defendant submits that the officer's illegal and pretextual stop and illegal detention for further questioning beyond the scope of the traffic violation - in order to confirm the officer's "hunch" or "gut instinct" - made any consent tainted and ineffective.

CONCLUSION

The Court of Appeals has rendered an amended opinion in this matter which is inherently inconsistent. A remand for a determination of issues abandoned by the State in the trial court and not raised until appeal is a departure outside the accepted and usual course of procedures. The amended opinion is in conflict with the first opinion rendered and therefore this Court should render a decision resolving the same by affirming the first opinion on the issues of consent and standing or ruling the search was illegal on the basis stated in this Cross-Petition.

RESPECTFULLY SUBMITTED this 31st day of May, 1990.

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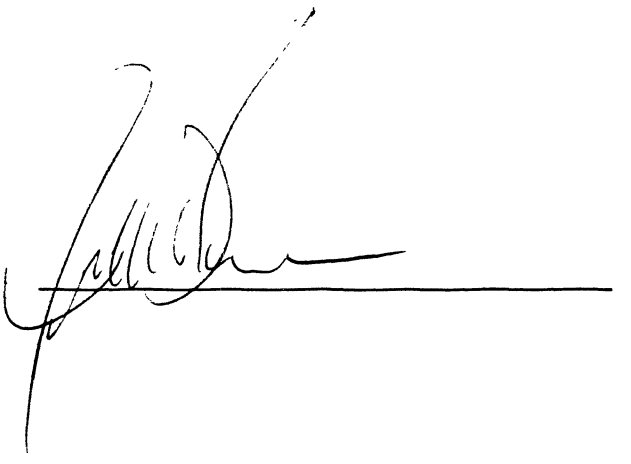
CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing CROSS-PETITION FOR WRIT OF CERTIORARI was mailed on the 31st day of May, 1990 to the following:

Christine F. Soltis
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114



ADDENDUMS

ADDENDUM A

There was no agreement by the Joan Cingolani plaintiffs to redeposit their shares with the district court in the event the Anna Cingolani plaintiffs successfully challenged the judgment and order of distribution on appeal, and there was no agreement by the Anna Cingolani plaintiffs to do the same if the Joan Cingolani plaintiffs successfully challenged the judgment and order of distribution in their appeal. With regard to the attorney fee claim, Anna and GWWB did not seek a stay of the September 22, 1988, order distributing one-third of the Joan Cingolani plaintiffs' recovery to HLP. Instead, Anna and GWWB acquiesced in the clerk's disbursement of the full contingent fee to HLP in accordance with Judge Harding's order and did not obtain any agreement from HLP to redeposit those funds with the district court if Anna prevailed in this court on the attorney fee distribution claim.

As a result of these actions by the parties and Anna's counsel, the issues raised in both appeals are moot. There is no longer any settlement money on deposit with the clerk of the district court, and there is no basis on which either the trial court or a party successful on appeal could compel the other party's return of the disbursed funds to the district court for redistribution. In short, even if we were to agree with one of the appellants on the settlement distribution claim or with Anna and GWWB on the attorney fee distribution claim, we could not afford any relief to the successful appellant. *See Black,* 656 P.2d at 410.

Appellants have not raised, and we do not perceive, any issues of public interest, *see Wickham v. Fisher,* 629 P.2d 896, 899 (Utah 1981), or any other extraordinary circumstances constituting an exception to the mootness doctrine, see Reynolds, 129 Utah Adv. Rep. at 33, that would justify our consideration of the merits of these moot appeals. We therefore dismiss both appeals, with the parties to bear their own costs.

Norman H. Jackson, Judge

WE CONCUR:
Richard C. Davidson, Judge
John Farr Larson, Judge

1. John Farr Larson, Senior Juvenile Judge, sitting by special appointment pursuant to Utah Code Ann. §78-3-24(10) (Supp. 1989).

2. Although technically an appellee in both cases, Utah Power & Light Company is not an active participant in either appeal because the two groups of appellants are fighting with each other over the distribution of the settlement to which all appellants agreed.

Cite as
132 Utah Adv. Rep. 45

IN THE UTAH COURT OF APPEALS

STATE of Utah,
Plaintiff and Appellee,
v.
Gregory MARSHALL,
Defendant and Appellant.

No. 890121-CA
FILED: April 18, 1990

Seventh District, Sevier County
Honorable Don V. Tibbs

ATTORNEYS:

Jerold D. McPhee and Kristine K. Smith, Salt Lake City, for Appellant

R. Paul Van Dam and Christine F. Soltis, Salt Lake City, for Appellee

Before Judges Davidson, Billings, and Jackson.

Petition for Interlocutory Appeal

AMENDED OPINION*

BILLINGS, Judge:

The appellant, Gregory J. Marshall ("Mr. Marshall"), was charged with possession of a controlled substance with the intent to distribute for value, a second degree felony, in violation of Utah Code Ann. §58-37-8 (1989). Mr. Marshall filed a pretrial motion to suppress the 140 pounds of marijuana seized from the rental car he was driving when he was arrested. The trial court denied Mr. Marshall's motion and he filed this interlocutory appeal. We reverse and remand for further proceedings consistent with this opinion.

We recite the facts surrounding the seizure of the contraband in detail as the legal issues presented are fact sensitive. *State v. Sierra,* 754 P.2d 972, 973 (Utah Ct. App. 1988). Utah Highway Patrol Trooper Denis Avery ("Trooper Avery") was driving on Interstate 70 near Salina, Utah. He noticed Mr. Marshall's vehicle in the left-hand lane passing a motor home. Trooper Avery observed that Mr. Marshall's turn signal remained blinking for approximately two miles after he passed the motor home. Not knowing whether Mr. Marshall's signal was malfunctioning or whether Mr. Marshall had negligently left the signal on, Trooper Avery pulled the vehicle over to inform Mr. Marshall of the problem and to give him a warning ticket. Trooper Avery had issued similar warning citations for turn signal violations approximately five to ten times in the previous six-month period.

Prior to stopping Mr. Marshall, Trooper Avery noticed the vehicle had California license plates. He approached Mr. Marshall's vehicle and informed Mr. Marshall of the turn signal problem. Mr. Marshall responded that he had been having "a hard time keeping the thing turned off."

Trooper Avery asked Mr. Marshall for his driver's license and vehicle registration. Mr. Marshall produced a New York driver's license and a California rental agreement for the vehicle. Mr. Marshall said he was going skiing in Denver and planned to return the car to San Diego, California. However, the rental agreement indicated that the car would be returned in New York in five days.

Trooper Avery acknowledged he became suspicious that Mr. Marshall might be transporting drugs. Trooper Avery asked Mr. Marshall to return with him to his patrol car where he issued a warning citation for "Lights, head, tail, other." Trooper Avery then returned Mr. Marshall's driver's license and the rental agreement.

Trooper Avery next asked Mr. Marshall if he was carrying alcohol, drugs or firearms. Mr. Marshall stated he was not. Trooper Avery then asked Mr. Marshall if he could "look inside the vehicle." Mr. Marshall responded, "Go ahead." Trooper Avery and Mr. Marshall walked back to Mr. Marshall's vehicle. The passenger door was locked and Mr. Marshall reached in on the driver's side to open the door. Trooper Avery noticed a small red bag on the floor of the vehicle and asked if he could open it. Mr. Marshall agreed. No contraband was found inside the bag or the passenger compartment of the vehicle.

Trooper Avery then asked if Mr. Marshall had a key to the trunk and if Mr. Marshall would open the trunk. Mr. Marshall attempted to open the trunk, but was shaking so badly that Trooper Avery had to assist him by holding the key latch cover up while Mr. Marshall inserted the key. Trooper Avery saw four padlocked suitcases when Mr. Marshall opened the trunk. Trooper Avery asked Mr. Marshall what the suitcases contained and Mr. Marshall responded "clothes." Trooper Avery then asked if he could look in the suitcases. Mr. Marshall immediately reversed his statement and responded that the suitcases were not his and must have already been in the trunk when he rented the vehicle. Trooper Avery testified there was some play in the zipper of one bag and he unzipped it far enough to see a green leafy substance. Trooper Avery then arrested Mr. Marshall for possession of a controlled substance.

Mr. Marshall did not testify or present any evidence to contradict Trooper Avery's testimony during the hearing below.

STANDARD OF REVIEW

"[W]e will not disturb the trial court's factual evaluation underlying its decision to grant or deny a motion to suppress unless it is clearly erroneous." *State v. Sierra*, 754 P.2d 972, 974 (Utah Ct. App. 1988). *See also State v. Walker*, 743 P.2d 191, 193 (Utah 1987); *State v. Johnson*, 771 P.2d 326, 327 (Utah Ct. App. 1989). Further, "[t]he trial court's finding is clearly erroneous only if it is against the clear weight of the evidence or if [the appellate court] reach[es] a definite and firm conviction that a mistake has been made." *State v. Sery*, 758 P.2d 935, 942 (Utah Ct. App. 1988).

Utah Rule of Criminal Procedure 12(c) requires the trial court to state its findings on the record "[w]here factual issues are involved in determining a motion." Those findings must be sufficiently detailed in order to allow us the opportunity to adequately review the decision below.[1]

PRETEXT STOP

Initially, Mr. Marshall contends Trooper Avery used the fact that his turn signal was malfunctioning as a pretext to stop his vehicle to search for evidence of drug trafficking.

The protective shield of the fourth amendment applies when an officer stops an automobile on the highway and detains its occupants. *State v. Sierra*, 754 P.2d 972, 975 (Utah Ct. App. 1988). A police officer may constitutionally stop a citizen on two alternative grounds. First, the stop "could be based on specific, articulable facts which, together with rational inferences drawn from those facts, would lead a reasonable person to conclude [defendant] had committed or was about to commit a crime." Id. (citing *Terry v. Ohio*, 392 U.S. 1, 21 (1968); *State v. Christensen*, 676 P.2d 408, 412 (Utah 1984); *State v. Trujillo*, 739 P.2d 85, 88 (Utah Ct. App. 1987)). Second, the police officer can "stop an automobile for a traffic violation committed in the officer's presence." *Sierra*, 754 P.2d at 977. However, an officer may not use a traffic violation stop as a pretext to search for evidence of a more serious crime. *Id.*

To determine if Trooper Avery stopped Mr. Marshall's vehicle to investigate his hunch that Mr. Marshall's vehicle was involved in drug trafficking, we determine whether a hypothetical reasonable officer, in view of the totality of the circumstances confronting him or her, would have stopped Mr. Marshall to issue a warning for failing to terminate a turn signal. *Id.* at 978.

Mr. Marshall claims Trooper Avery's stop of his vehicle is similar to the stop we found unconstitutional in *Sierra*. We disagree. In *Sierra*, the basis articulated for the stop was that the driver remained in the left lane too long after passing a car. In this case, Trooper

Avery perceived an equipment problem with Mr. Marshall's car. Either his turn signal was malfunctioning or he had negligently failed to turn it off.[2] Courts consistently have held that a police officer can stop a vehicle when he or she believes the vehicle's safety equipment is not functioning properly.[3]

Furthermore, unlike the officer in *Sierra*, Trooper Avery was not suspicious of Mr. Marshall for other reasons before the stop, had not followed him in order to find some reason to pull him over, and, before the alleged violation occurred, had not radioed for help thereby indicating he intended to stop the vehicle.

In conclusion, we find Trooper Avery's stop of Mr. Marshall's vehicle was not a pretext, but was a valid exercise of police authority to make certain Mr. Marshall's vehicle was functioning properly.

UNREASONABLE DETENTION

Next, Mr. Marshall complains that the extent of his detention and the scope of Trooper Avery's investigation exceeded constitutional limits.[4]

"[I]n determining whether the seizure and search were 'unreasonable' our inquiry is a dual one--whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Terry v. Ohio*, 392 U.S. 1, 19-20 (1968).

We have previously found that Trooper Avery's traffic stop of Mr. Marshall was justified. The remaining question is whether Trooper Avery's subsequent detention and questioning of Mr. Marshall was reasonably related to the initial traffic stop or was justified because Trooper Avery had a reasonable suspicion to believe Mr. Marshall was engaged in a more serious crime. *United States v. Guzman*, 864 F.2d 1512, 1519 (10th Cir. 1988).

The United States Supreme Court has not chosen to define a bright-line rule as to the acceptable length of a detention because "common sense and ordinary human experience must govern over rigid criteria." *United States v. Sharpe*, 470 U.S. 675, 685 (1985). The Court has chosen to focus, not on the length of the detention alone, but on "whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant." *Id.* at 686.

Trooper Avery wrote out the warning citation within ten minutes of stopping Mr. Marshall and then returned Mr. Marshall's driver's license and the vehicle rental agreement. Trooper Avery claims that as a result of his examination of Mr. Marshall's driver's license and the vehicle rental agreement and his brief conversation with Mr. Marshall, he became suspicious that Mr. Marshall was involved in drug trafficking. Specifically, Trooper Avery points to the fact that Mr. Marshall produced a New York driver's license and a California rental agreement for the vehicle. When questioned about the rental agreement, Mr. Marshall said he was going skiing in Colorado and planned to return the car to San Diego, California. However, the rental agreement indicated the car was to be returned to New York in five days, the approximate time it takes to drive directly from California to New York. In addition, Mr. Marshall was driving along a well-known drug trafficking route.

As a result of his suspicion, Trooper Avery then asked Mr. Marshall if he was carrying weapons, alcohol, or drugs in the vehicle. Mr. Marshall responded he was not. Then Trooper Avery allegedly asked for permission to look into the vehicle and received Mr. Marshall's consent.

The trial judge found that Trooper Avery's "investigation was reasonable in view of the defendant's statements in regards to the vehicle ownership and the driver's usage. The destination itinerary would have put a reasonable officer on notice that something was wrong." Although not directly so stating, the judge, in substance, concluded that Trooper Avery had reasonable suspicion to believe that Mr. Marshall was involved in illegal conduct. Although it is a close call, we agree with the trial court's assessment of the reasonableness of the detention.

We find that Trooper Avery's questioning of Mr. Marshall as to conduct unrelated to the traffic stop was justified because he had reasonable suspicion to believe Mr. Marshall was engaged in a more serious crime. *See Guzman*, 864 F.2d at 1519.

In conclusion, based on the totality of the circumstances, we agree with the trial court that Trooper Avery's ten-minute detention and brief questioning of Mr. Marshall prior to Mr. Marshall's alleged consent to search the vehicle was not an unreasonable detention.

SEARCH

On appeal, Mr. Marshall argues that even if his initial stop and subsequent detention were not constitutionally deficient, the subsequent search of the trunk of the vehicle and the suitcases found in the trunk without a warrant violated his fourth amendment rights. The state contends, on the other hand, that Mr. Marshall consented to the search of the trunk and abandoned any privacy interest in the suitcases and thus Trooper Avery's search of the suitcases was constitutionally permissible.[5] In our prior opinion, we focused solely on whether the search of the suitcases was proper. We found the warrantless search of the suitcases unconstitutional as we refused to allow

the state to raise the issue of fourth amendment standing for the first time on appeal. We granted the state's petition for rehearing to reexamine the related fourth amendment issues of voluntary consent and abandonment which are central to a resolution of this appeal.

1. Standing

The state, in its original brief on appeal, claimed Mr. Marshall was without standing to challenge the seizure of the suitcases as he had disclaimed any ownership or possessory interest in the suitcases during the search and thus had no expectation of privacy in their contents. *See Rakas v. Illinois,* 439 U.S. 128, 138-50 (1978); *State v. Valdez,* 689 P.2d 1334, 1335 (Utah 1984); *State v. Grueber,* 776 P.2d 70, 73-75 (Utah Ct. App. 1989); *State v. DeAlo,* 748 P.2d 194, 196-97 (Utah Ct. App. 1987). The state relies upon the following testimony from the preliminary hearing:

> Q. [Defense Counsel] And what was inside the trunk?
>
> A. [Trooper Avery] There were four suitcases.
>
> Q. Did you ask if you could look in those suitcases?
>
> A. Uh huh (affirmative). First of all, I asked him what was in the suitcases, and he told me, right quickly, clothes. Then when I looked at him again, he told me that he didn't know where they came from, they must have been in there when he rented the car.

In our prior opinion, we relied on the Utah Supreme Court decision of *State v. Schlosser,* 774 P.2d 1132 (Utah 1989), which squarely held that standing to challenge the validity of a search under the fourth amendment "is not a jurisdictional doctrine [but] is a substantive doctrine that identifies those who may assert rights against unlawful searches and seizures." *Id.* at 1138. Citing the general rule that a substantive issue or "claim of error cannot be raised for the first time on appeal," the supreme court deemed the issue of standing waived. *Id.* at 1138-39.

The state attempts to distinguish *Schlosser,* claiming that in that case the state not only failed to raise the issue of standing in the motion to suppress hearing, but also on appeal and that here, unlike *Schlosser,* the state raises standing simply as an alternative ground to uphold the trial court's denial of the motion to suppress.[6] We do not find the distinction determinative.[7]

The United States Supreme Court took the same position in *Steagald v. United States,* 451 U.S. 204 (1981), when it refused to allow the government to raise the issue of fourth amendment standing for the first time on appeal to provide an alternative ground to sustain the trial court's refusal to grant a motion to suppress. The Court concluded:

> Aside from arguing that a search warrant was not constitutionally required, the Government was initially entitled to defend against petitioner's charge of an unlawful search by asserting that petitioner lacked a reasonable expectation of privacy in the searched home, or that he consented to the search, or that exigent circumstances justified the entry. *The Government, however, may lose its right to raise factual issues of this sort before this Court* when it has made contrary assertions in the courts below, when it has acquiesced in contrary findings by those courts, or *when it has failed to raise such questions in a timely fashion during the litigation.*

Id. at 209 (emphasis added).

The state, on petition for rehearing, contends that language in *Rakas v. Illinois,* 439 U.S. 128 (1978) is contrary to our conclusion that the state should not be allowed to raise standing for the first time on appeal. We disagree. The language in Rakas relied upon by the state is consistent with our view.

> The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure. The *prosecutor argued* that petitioners lacked standing to challenge the search because they did not own the rifle, the shells or the automobile. *Petitioners did not contest the factual predicates of the prosecutor's argument and instead, simply stated that they were not required to prove ownership to object to the search. The prosecutor's argument gave petitioners notice that they were to be put to their proof* on any issue as to which they had the burden, and because of their failure to assert ownership, we must assume, for purposes of our review, that petitioners do not own the rifle or the shells.

Id. at 130 n.1 (citations omitted) (emphasis added).

We agree with the state and *Rakas* that Mr. Marshall has the ultimate burden of proof to establish that his fourth amendment rights were violated or, to put it otherwise, that he had an expectation of privacy in the area searched or the articles seized.[8] Nevertheless, warrantless searches are per se unreasonable and the burden is on the state, in the first instance, to show that a warrantless search is lawful. *State v. Christensen,* 676 P.2d 408, 411 (Utah 1984).

We believe *Rakas* is consistent with our view that the prosecutor, as part of the state's burden to establish the constitutionality of a warrantless search, must give a defendant "notice that he will be put to his proof" on the issue of fourth amendment standing. This can be done at any time during the hearing on a defendant's motion to suppress as long as the defendant has an opportunity to put on evidence to meet the claim.[9] Once the defendant has been put on notice that the state claims the warrantless search was constitutional because he has no expectation of privacy in the area searched, then the defendant must factually demonstrate that he does have standing to contest the warrantless search. We believe the *Schlosser* standing rule was fashioned to protect the defendant from being required to deal with new legal issues on appeal when he had no warning of the necessity to develop the relevant facts below.

2. Consent/Abandonment

The state, on petition for rehearing, excuses its failure to raise the issue of standing claiming that neither Mr. Marshall, the state nor the trial judge focused on the search of the suitcases in the motion to suppress hearing. Rather, the state claims the hearing centered on the pretextual nature of the stop, the unreasonable detention of Mr. Marshall and the unlawful search of the trunk.

Mr. Marshall, on petition for rehearing, claims the following comment made by defense counsel sufficiently focused the proceeding on the search of the suitcases: "Additionally there is no evidence that there was consent to search the bags."

Upon a re-examination of the record, we agree with the state that the parties and the trial judge did not focus on the critical issue of the search of the suitcases at the motion to suppress hearing. The result is that the trial judge did not make adequate findings of fact on the issues of voluntary consent to search the trunk or the suitcases and Mr. Marshall's alleged abandonment of any privacy interest in the suitcases, which the parties now agree are pivotal on appeal. We therefore remand for a rehearing on these critical issues. We nevertheless discuss the controlling law to guide the trial court on rehearing.

A search is valid under the fourth amendment if it is conducted as a result of the defendant's voluntary consent. *Schneckloth v. Bustamonte,* 412 U.S. 218, 219 (1973); *State v. Sierra,* 754 P.2d 972, 980 (Utah Ct. App. 1988). "[T]he question [of] whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." *Schneckloth,* 412 U.S. at 227. "A trial court's finding of voluntary consent will not be reversed unless it is clearly erroneous." *United States v. Miller,* 589 F.2d 1117, 1130 (1st Cir. 1978), *cert. denied,* 440 U.S. 958 (1979).

In *United States v. Abbott,* 546 F.2d 883 (10th Cir. 1977), the Tenth Circuit outlined the specifics necessary for the government to sustain its burden to show that voluntary consent was given:

> (1) There must be clear and positive testimony that the consent was "unequivocal and specific" and "freely and intelligently given"; (2) the government must prove consent was given without duress or coercion, express or implied; and (3) the courts indulge every reasonable presumption against the waiver of fundamental constitutional rights and there must be convincing evidence that such rights were waived.

Id. at 885 (quoting *Villano v. United States,* 310 F.2d 680, 684 (10th Cir. 1962)). *See also United States v. Recalde,* 761 F.2d 1448, 1453 (10th Cir. 1985). *See generally State v. Whittenback,* 621 P.2d 103, 106 (Utah 1980); *State v. Sierra,* 754 P.2d 972, 980-81 (Utah Ct. App. 1988).

Even when a defendant voluntarily consents to a search, the ensuing search must be limited in scope to only the specific area agreed to by defendant. "The scope of a consent search is limited by the breadth of the actual consent itself .... Any police activity that transcends the actual scope of the consent given encroaches on the Fourth Amendment rights of the suspect." *United States v. Gay,* 774 F.2d 368, 377 (10th Cir. 1985); *see, e.g., People v. Thiret,* 685 P.2d 193, 201 (Colo. 1984) (scope of consent exceeded when police asked to "look around" the house, then conducted a 45-minute search of rooms, drawers, boxes and closed containers).

The trial court made the following conclusory finding on the issue of Mr. Marshall's consent: "The Defendant consented to the search. There was no evidence of duress or coercion." This conclusory finding on consent is not particularly helpful in determining whether Mr. Marshall's consent was "unequivocal and specific" as it does not detail what Mr. Marshall agreed could be searched--the interior of the passenger compartment, the trunk, or the locked suitcases.[10] Furthermore, the relevant portions from the transcript of Trooper Avery's testimony are troubling:

> Q. [Defense Counsel] What were the words he [sic] used when you asked him to search his vehicle?
>
> ....
>
> A. [Trooper Avery] I asked Mr. Marshall if--if there were any--if there was any--were there any drugs in the vehicle, and he took two or three seconds--no, wait a minute, I guess--I first asked him

> if he was carrying any weapons and he told me no. I then asked him if he was carrying any--if there was any alcohol in the vehicle, he said that he did not drink. I recall both answers were quite quick. And then I asked him if there were any drugs in the vehicle, he paused for, you know, probably two or three seconds, and then told me no. I then asked him if it would be okay if I looked in the vehicle, search the vehicle, and he said go ahead.
> Q. Now, did you ask if you could look in the vehicle, or did you ask if you could search the vehicle?
> A. Well, according to this [his report], I said--I asked if I could look in the vehicle.
> Q. So, it was "look in the vehicle"? You didn't ask if you could open anything inside the vehicle or anything else, did you?
> A. No. I just asked if I could look in the vehicle.
> Q. And what happened then?
> A. Mr. Marshall just told me, you know, he said go right ahead. He got out, gathered up his papers and we walked up to the front of the vehicle, and he had to open the passenger door, as I recall.
> ....
> Q. And how did you get in the trunk?
> A. I asked him, I said--asked him if he had the key to the trunk and he says yes, and I says--and I asked him if he'[d] open it, which he did, he tried. He was extremely nervous at the time. I--
> Q. So did you open the trunk?
> A. No, sir, I did not. He--he could not--there was a little latch over the key hole. He was shaking so hard, he couldn't even hold the latch open, so I held the latch up for him so he could insert the key.

Without the assistance of specific findings of fact, we cannot resolve the difficult issue of whether Mr. Marshall's opening the trunk constituted implied consent to search the trunk under the totality of the circumstances presented. *See United States v. Almand,* 565 F.2d 927, 930 (5th Cir.), *cert. denied,* 439 U.S. 824 (1978) (voluntary consent found where defendant silently reached into his pocket, removed key, then unlocked and opened camper door).

Furthermore, the record creates a substantial question as to whether the court's general finding that there was "no evidence of duress or coercion" was intended to apply to the search of the trunk or, even if it was, whether the finding is consistent with the standard required for a voluntary consent. *See United States v. Abbott,* 546 F.2d 883 (10th Cir. 1977); *State v. Sierra,* 754 P.2d 972, 980-81 (Utah Ct. App. 1988). Likewise, the court in its findings fails to focus on the search of the locked suitcases and the issues of voluntary consent or abandonment.

Even if we were to accept the state's argument that the undisputed facts support a finding that Mr. Marshall abandoned[11] any expectation of privacy in the suitcases by his ambiguous disclaimer of ownership and that the state should be allowed to raise this fourth amendment standing issue for the first time on appeal, we would be unable to dispose of this case on the record before us. The state, in its petition for rehearing, correctly points out that "a loss of standing to challenge a search cannot be brought about by illegal police conduct." *United States v. Labat,* 696 F. Supp. 1419, 1425 (D. Kan. 1988).

Thus, we would have to determine if the search of the trunk was illegal or was a result of a voluntary consent. This we cannot do on the record before us.

Even if we determined the search of the trunk was unlawful, the "defendant must show a nexus between the allegedly unlawful police conduct and the abandonment of the property." *Id.* at 1426. *See, e.g., United States v. Tolbert,* 692 F.2d 1041 (6th Cir. 1982), *cert. denied,* 464 U.S. 933 (1983) (While "an unconstitutional seizure or arrest which prompts a disclaimer of property vitiates that act," id. at 1045, the court found the defendant's disclaimer was not precipitated by improper conduct. Id. at 1048.); *United States v. Gilman,* 684 F.2d 616, 620 (9th Cir. 1982) ("There must be a nexus between the allegedly unlawful police conduct and abandonment of property if the challenged evidence is to be suppressed."); *United States v. Beck,* 602 F.2d 726, 730 (5th Cir. 1979) (if there is a nexus between unlawful police conduct and the discovery of evidence, the court should suppress the evidence). *See generally Search and Seizure: What Constitutes Abandonment of Personal Property within Rule that Search and Seizure of Abandoned Property Is Not Unreasonable--Modern Cases,* 40 A.L.R.4th 381 (1985). Again, there is no finding on this crucial issue.

Therefore, we reverse and remand this interlocutory appeal for a rehearing on Mr. Marshall's motion to suppress on the limited issues of whether Mr. Marshall voluntarily consented to the search of the trunk or the suitcases, whether Mr. Marshall abandoned any privacy interest in the suitcases and thus lacks standing to challenge their search, and finally, if the trial court finds there was an illegal search of the trunk or suitcases, whether there is a sufficient nexus between that illegal search and Mr. Marshall's aban-

donment, if any, of his expectation of privacy in the suitcases.

Judith M. Billings, Judge

WE CONCUR:

Richard C. Davidson, Judge

Norman H. Jackson, Judge

*This opinion issued on Petition for Rehearing replaces the opinion of the same name issued on December 26, 1989.

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1. Utah appellate courts have consistently required detailed findings of fact to support a judgment entered by a trial judge in civil cases. *Rucker v. Dalton*, 598 P.2d 1336, 1338 (Utah 1979) ("The importance of complete, accurate and consistent findings of fact in a case tried by a judge is essential to the resolution of dispute under the proper rule of law. To that end the findings should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached."); *Sampson v. Richins*, 770 P.2d 998, 1002-03 (Utah Ct. App. 1989) (findings of fact must indicate the "mind of the court." (quoting *Parks v. Zions First Nat'l Bank*, 673 P.2d 590, 601 (Utah 1983)).

Detailed findings of fact likewise greatly ease the burden of an appellate court in its review of a trial court's decision on a motion to suppress. This is particularly true where multiple issue are presented in the motion to suppress. 4 W. LaFave, *Search & Seizure* §11.2, at 252 (1987) [hereinafter "LaFave"] (citing *State v. Johnson*, 16 Or. App. 560, 519 P.2d 1053, 1058-59 (1974)). Many jurisdictions require specific findings of fact on all motions to suppress. *See* LaFave at §11.2 n.188. We believe the requirement a sound one.

2. While the warning citation does not specify which provision of the Utah Code Mr. Marshall violated, the state asserts that his conduct was in violation of Utah Code Ann. §41-6-117(1) (1988) which, with our emphasis, provides:

> It is a misdemeanor for any person to drive or move or for the owner to cause or knowingly permit to be driven or moved on any highway any vehicle or combination of vehicles which is in such unsafe condition as to endanger any person, *or which does not contain those parts or is not at all times equipped with lamps and other equipment in proper condition and adjustment*....

3. In *Delaware v. Prouse*, 440 U.S. 648, 660-61 (1979), the United States Supreme Court stated that an officer has a duty in the interest of highway safety to stop vehicles for safety reasons. "Many violations of minimum vehicle-safety requirements are observable, and something can be done about them by the observing officer, directly and immediately." *Id.* at 660. The Court inferred that as long as an officer suspects the driver is violating "any one of the multitude of applicable traffic and equipment regulations," the police officer may legally stop the vehicle. Id. at 661. *See Townsel v. State*, 763 P.2d 1353, 1355 (Alaska Ct. App. 1988) (court held stop justified when vehicle's headlight was out, a tail light was broken, the license plate and windows were obscured, and speeding); *State v. Puig*, 112 Ariz. 519, 544 P.2d 201, 202 (1975) (suspicion of defective turn signals justified stop); *State v. Fuller*, 556 A.2d 224, 224 (Me. 1989) (stop justified when blinking headlights led officer to stop vehicle for safety reasons).

4. We do not analyze this issue under article I, section 14 of the Utah Constitution as the state constitutional issue was not sufficiently particularized below nor is a reasoned analysis provided on appeal as to why our analysis should be different under Utah's constitution. *See State v. Johnson*, 771 P.2d 326, 327-28 (Utah Ct. App. 1989).

5. The state does not argue that Trooper Avery had probable cause to search either the car or the suitcases. We, therefore, need not deal with the troublesome issue of whether probable cause to search an automobile is sufficient under the automobile exception to search a locked suitcase found in the trunk of a car. *See, e.g., United States v. Ross*, 456 U.S. 798 (1982) (if probable cause exists, police can search closed containers found in vehicle); *Arkansas v. Sanders*, 442 U.S. 753 (1979) (warrantless search of a suitcase found in the trunk of a taxi invalid); *United States v. Chadwick*, 433 U.S. 1 (1977) (warrantless search of a footlocker found in the trunk of a vehicle invalid); *State v. Hygh*, 711 P.2d 264, 272 n.1 (Utah 1985) (Zimmerman, J., concurring separately) (criticizing the *Ross* holding).

6. Prior to *Schlosser*, the Utah Supreme Court had, in several cases, considered standing for the first time on appeal and had utilized the doctrine to refuse to consider the constitutional validity of a challenged search. *See, e.g., State v. Constantino*, 732 P.2d 125, 126-27 (Utah 1987) (per curiam) (court did not address whether the issue of standing had been raised below, but stated that defendant could not assert any expectation of privacy in vehicle because he did not own vehicle and had presented no testimony that he had permission of owner or had borrowed vehicle "under circumstances that would imply permissive use"); *State v. Iacono*, 725 P.2d 1375, 1377-78 (Utah 1986) (State below argued there was consent by defendant's ex-wife to search his mother's trailer. On appeal, the state argued defendant had no possessory or proprietary interest in the trailer and thus had no expectation of privacy. The court declined to reach the issue of consent because it found that defendant lacked standing to object to the search because the stipulated evidence did not show that defendant shared ownership, use or possession of the trailer.); *State v. Valdez*, 689 P.2d 1334, 1335 (Utah 1984) (At trial, the defendant produced evidence that neither the attache case in which the evidence was found nor the vehicle belonged to the defendant. The court did not address whether the issue of standing was raised below, but declined to reach the question of the validity of the search because the defendant conceded he did not own the case or the vehicle and had failed to show any expectation of privacy.). In these earlier cases, it is sometimes unclear whether the Utah Supreme Court raised the issue of standing *sua sponte* on appeal or permitted the state to raise the issue of standing for the first time on appeal. We assume that *Schlosser* supercedes these earlier cases and thus do not follow them.

7. Although the Utah Supreme Court refused to allow standing to be utilized to attack the trial court's granting of a motion to suppress in *Schlosser*, the court relied on *State v. Goodman*, 42 Wash. App. 331, 711 P.2d 1057 (1985), which held the state could not raise the issue of standing for the first time on appeal to provide an alternative ground

for sustaining the trial court's denial of a motion to suppress. *Id.* at 1060.

8. However, the failure of the state to challenge Mr. Marshall's standing at the suppression hearing did not give Mr. Marshall an opportunity to assert his expectation of privacy. *See Combs v. United States*, 408 U.S. 224, 227-28 (1972) (per curiam) (Where petitioner's failure to assert an expectation of privacy may have been explained by the Government's failure to challenge standing either at the suppression hearing or at trial, the United States Supreme Court remanded to the district court for further proceedings to allow petitioner to establish a privacy interest.).

9. The defendant's testimony at the motion to suppress hearing cannot be used against the defendant at trial. *See Simmons v. United States*, 390 U.S. 377, 394 (1968) (prosecutor cannot use a defendant's testimony at a suppression hearing as substantive evidence of guilt at trial unless defendant makes no objection). We note, however, that the United States Supreme Court had not decided whether the *Simmons* rule precludes the use of a defendant's suppression hearing testimony to impeach the defendant's testimony at trial. *See United States v. Salvucci*, 448 U.S. 83, 94 & n.9 (1980).

10. *See supra* note 1 and accompanying text for a discussion of the importance of detailed findings on a motion to suppress.

11. *See, e.g., United States v. Jones*, 707 F.2d 1169, 1173 (10th Cir. 1983) (Court found abandonment when police initially saw defendant running with a brown satchel, however, when they captured defendant, he did not have the satchel and disavowed knowledge of it. Police later found the satchel outside the building and searched it.); *United States v. Kendall*, 655 F.2d 199, 202 (9th Cir. 1981), *cert. denied*, 455 U.S. 941 (1982) (court found abandonment where the defendant, after picking up the luggage at the claim area, produced a mismatched baggage claim check, told agents that his name was not on the luggage name tag, and allowed the agents to return the luggage to the claim area, thus giving the agents the impression that he had no interest in the luggage); *United States v. Veatch*, 674 F.2d 1217, 1220-21 (9th Cir. 1981), cert. denied, 456 U.S. 946 (1982) (court found abandonment where the defendant disclaimed ownership of a wallet found on the seat of the vehicle); *United States v. Colbert*, 474 F.2d 174, 177 (5th Cir. 1973) (en banc) (court found abandonment when defendants disclaimed ownership of suitcases and began to walk away from them).

Cite as
132 Utah Adv. Rep. 52

IN THE UTAH COURT OF APPEALS

Carl N. SMITH and Dawna LaVerne Smith,
Plaintiffs and Appellants,
v.
LINMAR ENERGY CORPORATION, a Delaware corporation,
Defendant and Appellee.

No. 880661-CA
FILED: April 19, 1990

Seventh District, Duchesne County
Honorable Dennis L. Draney

ATTORNEYS:

Gordon A. Madsen and Robert C. Cummings, Salt Lake City, for Appellants

Robert W. Adkins and Terry L. Christiansen, Coalville, for Appellee

Before Judges Davidson, Bench, and Billings.

BILLINGS, Judge:

Plaintiffs/appellants Carl N. Smith and Dawna LaVerne Smith ("Smiths") appeal from a money judgment in their favor. The Smiths claim the trial court incorrectly assessed the damages due them as a result of the defendant/appellee Linmar Energy Corporation's ("Linmar Energy") placement of an oil well, battery storage tank, and road on the Smiths' property pursuant to an oil and gas lease. We affirm.

The Smiths are owners of a fee interest in 20 acres of land located adjacent to the city limits of Altamont in Duchesne County. Linmar Energy is the lessee under an oil and gas lease covering this property. The Smiths' 20-acre tract, including the land now occupied by the well site, has been used exclusively for agricultural purposes. The Smiths' property is located in the Altamont-Bluebell oil field and is surrounded by numerous oil wells, some of which may be seen from the Smith property.

In 1983, Linmar Energy, pursuant to its lease, entered onto the southwest corner of the Smiths' 20-acre parcel to install an oil well along with an oil well battery and storage tanks. Linmar Energy also constructed an access road from the county road on the north to the well site. Linmar Energy occupied 4.76 acres of the 20-acre parcel.

Linmar Energy considered several other alternative locations for the well site, but rejected the other sites based on geological and economic factors. Prior to construction of the well site, Linmar Energy's representative contacted Carl Smith and met him on the

ADDENDUM B

debt.

Yoho states that his credit manager handled the document at issue, and that Yoho had never seen it until his deposition in this action. He does not, however, dispute Shillington's estimate of the date on which the guaranty agreement was executed. Yoho merely states that he discussed the financial arrangements with one of Shillington's employees, who said that Shillington had agreed to guaranty payment. Although Yoho never discussed the agreement with Shillington personally, he insists that no goods would have been delivered to RTEM prior to such an agreement from Shillington.

A review of this evidence in the light most favorable to Shillington indicates that the written guaranty was not executed until after the goods had been delivered. This leaves as a genuine question of material fact whether the document is merely a memorialization of a parol agreement made between the parties or their agents prior to the delivery of the goods, or a gratuitous promise made thereafter. Without a previous parol agreement, the signed document may be unenforceable. *See Dementas v. Estate of Tallas*, 764 P.2d 628, 633 (Utah Ct. App. 1988) ("Events which occur prior to the making of the promise and not with the purpose of inducing the promise in exchange are viewed as 'past consideration' and are the legal equivalent of 'no consideration.'") (quoting 1 A. Corbin, *Corbin on Contracts* §210 (1963)).

Although the trial court did not articulate its reasoning behind the grant of summary judgment, only one material fact in dispute is required to reverse a summary judgment. *See Ruffinengo v. Miller*, 579 P.2d 342, 343 (Utah 1978). Since we hold that the existence of a parol agreement is one such unresolved material fact, we reverse the summary judgment and remand the case for trial or other proceedings.2

Russell W. Bench, Judge

WE CONCUR:
Norman H. Jackson, Judge
J. Robert Bullock, Judge

1. J. Robert Bullock, Senior District Judge, sitting by special appointment pursuant to Utah Code Ann. §78-3-24(10) (Supp. 1989).
2. We make no pronouncement on the applicability of the statute of frauds, Utah Code Ann. §§25-5-4(2),-6 (Supp. 1989 & 1989), an issue not raised by the parties.

Cite as
124 Utah Adv. Rep. 60

IN THE UTAH COURT OF APPEALS

The STATE of Utah,
Plaintiff and Respondent,
v.
Gregory MARSHALL,
Defendant and Appellant.

No. 890121-CA
FILED: December 26, 1989

Seventh District, Sevier County
Honorable Don V. Tibbs

ATTORNEYS:

Jerold D. McPhee and Kristine K. Smith, Salt Lake City, for Appellant

R. Paul Van Dam and Christine F. Soltis, Salt Lake City, for Respondent

Before Judges Davidson, Billings, and Jackson.

Petition for Interlocutory Appeal

BILLINGS, Judge:

The appellant, Gregory J. Marshall ("Mr. Marshall"), was charged with possession of a controlled substance with the intent to distribute for value, a second degree felony, in violation of Utah Code Ann. §58-37-8 (1989). Mr. Marshall filed a pre-trial motion to suppress the 140 pounds of marijuana seized from the rental car he was driving when he was arrested. The trial court denied Mr. Marshall's motion and he filed this interlocutory appeal. We reverse.

We recite the facts surrounding the seizure of the contraband in detail as the legal issues presented are fact sensitive. *State v. Sierra*, 754 P.2d 972, 973 (Utah Ct. App. 1988). Utah Highway Patrol Trooper Denis Avery ("Trooper Avery") was driving on Interstate 70 near Salina, Utah. He noticed Mr. Marshall's vehicle in the left-hand lane passing a motor home. Trooper Avery observed that Mr. Marshall's turn signal remained blinking for approximately two miles after he passed the motor home. Not knowing whether Mr. Marshall's signal was malfunctioning or whether Mr. Marshall had negligently left the signal on, Trooper Avery pulled the vehicle over to inform Mr. Marshall of the problem and to give him a warning ticket. Trooper Avery had issued similar warning citations for turn signal violations approximately five to ten times in the previous six-month period.

Prior to stopping Mr. Marshall, Trooper Avery noticed the vehicle had California license plates. He approached Mr. Marshall's vehicle and informed Mr. Marshall of the turn

signal problem. Mr. Marshall responded that he had been having "a hard time keeping the thing turned off."

Trooper Avery asked Mr. Marshall for his driver's license and vehicle registration. Mr. Marshall produced a New York driver's license and a California rental agreement for the vehicle. Mr. Marshall said he was going skiing in Denver and planned to return the car to San Diego, California. However, the rental agreement indicated that the car would be returned in New York in five days.

Trooper Avery acknowledged he became suspicious that Mr. Marshall might be transporting drugs. Trooper Avery asked Mr. Marshall to return with him to his patrol car where he issued a warning citation for "Lights, head, tail, other." Trooper Avery then returned Mr. Marshall's driver's license and the rental agreement.

Trooper Avery next asked Mr. Marshall if he was carrying alcohol, drugs or firearms. Mr. Marshall stated he was not. Trooper Avery then asked Mr. Marshall if he could "look inside the vehicle." Mr. Marshall responded, "Go ahead." Trooper Avery and Mr. Marshall walked back to Mr. Marshall's vehicle. The passenger door was locked and Mr. Marshall reached in on the driver's side to open the door. Trooper Avery noticed a small red bag on the floor of the vehicle and asked if he could open it. Mr. Marshall agreed. No contraband was found inside the bag or the passenger compartment of the vehicle.

Trooper Avery then asked if Mr. Marshall had a key to the trunk and if Mr. Marshall would open the trunk. Mr. Marshall attempted to open the trunk, but was shaking so badly that Trooper Avery had to assist him by holding the key latch cover up while Mr. Marshall inserted the key. Trooper Avery saw four padlocked suitcases when Mr. Marshall opened the trunk. Trooper Avery asked Mr. Marshall what the suitcases contained and Mr. Marshall responded "clothes." Trooper Avery then asked if he could look in the suitcases. Mr. Marshall immediately reversed his statement and responded that the suitcases were not his and must have already been in the trunk when he rented the vehicle. Trooper Avery testified there was some play in the zipper of one bag and he unzipped it far enough to see a green leafy substance. Trooper Avery then arrested Mr. Marshall for possession of a controlled substance.

Mr. Marshall did not testify or present any evidence to contradict Trooper Avery's testimony during the hearing below.

STANDARD OF REVIEW

"[W]e will not disturb the trial court's factual evaluation underlying its decision to grant or deny a motion to suppress unless it is clearly erroneous." *State v. Sierra*, 754 P.2d 972, 974 (Utah Ct. App. 1988). *See also State v. Walker*, 743 P.2d 191, 193 (Utah 1987); *State v. Johnson*, 771 P.2d 326, 327 (Utah Ct. App. 1989). Further, "[t]he trial court's finding is clearly erroneous only if it is against the clear weight of the evidence or if [the appellate court] reach[es] a definite and firm conviction that a mistake has been made." *State v. Sery*, 758 P.2d 935, 942 (Utah Ct. App. 1988).

STANDING--EXPECTATION OF PRIVACY

The state argues that we need not reach the issues asserted by Mr. Marshall that Trooper Avery's stop of Mr. Marshall was an unconstitutional pretext, or that his consequent detention exceeded constitutional limits, or that Mr. Marshall did not voluntarily consent to the search of the suitcases found in the trunk of his rental car. As a threshold argument, the state claims that Mr. Marshall lacks standing to challenge the seizure of the suitcases as he disclaimed any ownership or possessory interest in the suitcases both during the search and subsequent to his arrest and, thus, had no expectation of privacy in their contents.[1] *See Rakas v. Illinois*, 439 U.S. 128, 138-50 (1978); *State v. Valdez*, 689 P.2d 1334, 1335 (Utah 1984); *State v. Grueber*, 776 P.2d 70, 73-75 (Utah Ct. App. 1989); *State v. DeAlo*, 748 P.2d 194, 196-97 (Utah Ct. App. 1987).

The fatal problem with the state's argument is the state raises standing for the first time on appeal. The Utah Supreme Court recently squarely held that standing to challenge the validity of a search under the fourth amendment "is not a jurisdictional doctrine [but] is a substantive doctrine that identifies those who may assert rights against unlawful searches and seizures." *State v. Schlosser*, 774 P.2d 1132, 1138 (Utah 1989). Citing the general rule that a substantive issue or "claim of error cannot be raised for the first time on appeal," the court deemed the issue of standing waived. *Id.* at 1138-39.

The state attempts to distinguish Schlosser, claiming that in Schlosser the state not only failed to raise the issue of standing in the motion to suppress hearing, but also on appeal. We do not find the distinction determinative. We believe the Schlosser standing rule was fashioned to protect the defendant from being required to deal with new legal issues on appeal when he had no warning of the necessity to develop the relevant facts below.

In this case, the state, the defendant, and the trial court all focused on the issue of voluntary consent to search the suitcases, not standing to assert a privacy interest in the suitcases. The defendant may well have chosen to testify at the motion to suppress hearing to contradict the trooper's testimony that he had

disclaimed ownership of the suitcases had the state chosen to litigate the issue of standing below.

In *Steagald v. United States*, 451 U.S. 204 (1981), the United States Supreme Court also refused to allow the government to raise the issue of fourth amendment standing for the first time on appeal. The Court refused to allow the state to claim that the defendant had no expectation of privacy in the house searched as a ground for sustaining the lower court's ruling denying a motion to suppress when the state had not made this claim at trial. The Court concluded:

> The Government, however, may lose its right to raise factual issues of this sort before this Court when it has made contrary assertions in the courts below, when it has acquiesced in contrary findings by those courts, or when it has failed to raise such questions in a timely fashion during the litigation.

Id. at 209.

Thus, we conclude that the state may not for the first time on appeal claim that Mr. Marshall lacks standing to assert a privacy interest in the contraband seized to uphold the trial court's denial of the motion to suppress.[2]

PRETEXT STOP

Initially, Mr. Marshall contends Trooper Avery used the fact that his turn signal was malfunctioning as a pretext to stop his vehicle to search for evidence of drug trafficking.

The protective shield of the fourth amendment applies when an officer stops an automobile on the highway and detains its occupants. *State v. Sierra*, 754 P.2d 972, 975 (Utah Ct. App. 1988). A police officer may constitutionally stop a citizen on two alternative grounds. First, the stop "could be based on specific, articulable facts which, together with rational inferences drawn from those facts, would lead a reasonable person to conclude [defendant] had committed or was about to commit a crime." Id. (citing *Terry v. Ohio*, 392 U.S. 1, 21 (1968); *State v. Christensen*, 676 P.2d 408, 412 (Utah 1984); *State v. Trujillo*, 739 P.2d 85, 88 (Utah Ct. App. 1987)). Second, the police officer can "stop an automobile for a traffic violation committed in the officer's presence." *Sierra*, 754 P.2d at 977. However, an officer may not use a traffic violation stop as a pretext to search for evidence of a more serious crime. *Id.*

To determine if Trooper Avery stopped Mr. Marshall's vehicle to investigate his hunch that Mr. Marshall's vehicle was involved in drug trafficking, we determine whether a hypothetical reasonable officer, in view of the totality of the circumstances confronting him or her, would have stopped Mr. Marshall to issue a warning for failing to terminate a turn signal. *Id.* at 978.

Mr. Marshall claims Trooper Avery's stop of his vehicle is similar to the stop we found unconstitutional in *Sierra*. We disagree. In *Sierra*, the basis articulated for the stop was that the driver remained in the left lane too long after passing a car. In this case, Trooper Avery perceived an equipment problem with Mr. Marshall's car. Either his turn signal was malfunctioning or he had negligently failed to turn it off.[3] Courts consistently have held that a police officer can stop a car when he or she believes the car's safety equipment is not functioning properly.[4]

Furthermore, unlike the officer in *Sierra*, Trooper Avery was not suspicious of Mr. Marshall for other reasons before the stop, had not followed him in order to find some reason to pull him over, and, before the alleged violation occurred, had not radioed for help thereby indicating he intended to stop the vehicle.

In conclusion, we find Trooper Avery's stop of Mr. Marshall's vehicle was not a pretext, but was a valid exercise of police authority to make certain Mr. Marshall's vehicle was functioning properly.

UNREASONABLE DETENTION

Next, Mr. Marshall complains generally that the extent of his detention and the scope of Trooper Avery's investigation exceeded constitutional limits.[5] Again, we disagree.

Once a driver is lawfully stopped, an officer may inquire as to information about the driver and the vehicle "reasonably related in scope to the justification" for the detention. *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975) (quoting *Terry v. Ohio*, 392 U.S. 1, 29 (1968)).

The United States Supreme Court has not chosen to define a bright-line rule as to the acceptable length of a detention because "common sense and ordinary human experience must govern over rigid criteria." *United States v. Sharpe*, 470 U.S. 675, 685 (1985). The Court has chosen to focus, not on the length of the detention alone, but on "whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant." *Id.* at 686.

In *Sharpe*, the Court found that a twenty-minute detention after a highway stop for suspected drug trafficking was not excessive where the officer examined the driver's license, examined his ownership papers, requested and was denied permission to search the camper, and then stepped on the rear bumper, noting that it did not move, thus confirming his suspicion that it was overloaded. *Id.* at 687. The Court distinguished this reasonable detention from those involved in *Dunaway v. New York*, 442 U.S. 200 (1979);

Florida v. Royer, 460 U.S. 491 (1983); and *United States v. Place*, 462 U.S. 696 (1983), stating that it was not the length of detention, but the events which occurred during the detention which transformed the investigative stops in these cases into a "defacto arrest." *Id.* at 683-86.[6]

Trooper Avery wrote out the warning citation within ten minutes of stopping Mr. Marshall. Based upon the facts obtained during routine questioning and issuing the warning citation, the officer became suspicious that Mr. Marshall was involved in transporting drugs. He returned Mr. Marshall's driver's license, the car rental agreement and the citation. Trooper Avery then asked Mr. Marshall if he was carrying weapons, alcohol, or drugs in the vehicle. Mr. Marshall responded he was not. Then Trooper Avery immediately asked for permission to look into the vehicle and received Mr. Marshall's consent.

We find that Trooper Avery's initial investigation was within the scope of his traffic stop and that Trooper Avery's immediate request to search the vehicle and his expeditious completion of the search did not constitute an unreasonable detention. Furthermore, Mr. Marshall was not moved to another location nor treated in a manner to support a finding of a "defacto arrest."

CONSENT

Finally, Mr. Marshall argues that even if his initial stop and subsequent detention were not constitutionally deficient, the subsequent search of the suitcases found in the trunk of the vehicle without a warrant violated his fourth amendment rights. The state contends, on the other hand, that Mr. Marshall consented to the search of the suitcases and thus Trooper Avery's search of the suitcases and subsequent seizure of the marijuana without a search warrant was constitutionally permissible.[7]

A search is valid under the fourth amendment if it is conducted as a result of the defendant's voluntary consent. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *State v. Sierra*, 754 P.2d 972, 980 (Utah Ct. App. 1988). "[T]he question [of] whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." *Schneckloth*, 412 U.S. at 227. "A trial court's finding of voluntary consent will not be reversed unless it is clearly erroneous." *United States v. Miller*, 589 F.2d 1117, 1130 (1st Cir. 1978), *cert. denied*, 440 U.S. 958 (1979).

In *United States v. Abbott*, 546 F.2d 883 (10th Cir. 1977), the Tenth Circuit outlined the specifics necessary for the government to sustain its burden to show that voluntary consent was given:

> (1) There must be clear and positive testimony that the consent was "unequivocal and specific" and "freely and intelligently given"; (2) the government must prove consent was given without duress or coercion, express or implied; and (3) the courts indulge every reasonable presumption against the waiver of fundamental constitutional rights and there must be convincing evidence that such rights were waived.

Id. at 885 (quoting *Villano v. United States*, 310 F.2d 680, 684 (10th Cir. 1962)). *See also United States v. Recalde*, 761 F.2d 1448, 1453 (10th Cir. 1985). *See generally State v. Whittenback*, 621 P.2d 103, 106 (Utah 1980); *State v. Sierra*, 754 P.2d 972, 980-81 (Utah Ct. App. 1988).

Even when a defendant voluntarily consents to a search, the ensuing search must be limited in scope to only the specific area agreed to by defendant. "The scope of a consent search is limited by the breadth of the actual consent itself .... Any police activity that transcends the actual scope of the consent given encroaches on the Fourth Amendment rights of the suspect." *United States v. Gay*, 774 F.2d 368, 377 (10th Cir. 1985); *see, e.g., People v. Thuret*, 685 P.2d 193, 201 (Colo. 1984) (scope of consent exceeded when police asked to "look around" the house, then conducted a 45-minute search of rooms, drawers, boxes and closed containers).

The trial court made the following finding on the issue of Mr. Marshall's consent: "The Defendant consented to the search. There was no evidence of duress or coercion." This conclusory finding on consent is not particularly helpful in determining whether Mr. Marshall's consent was "unequivocal and specific" as it does not detail what Mr. Marshall agreed could be searched--the interior of the passenger compartment, the trunk, or the locked suitcases. The relevant portions from the transcript of Trooper Avery's testimony are more enlightening:

> Q. What were the words he [sic] used when you asked him to search his vehicle?
>
> ....
>
> A. I asked Mr. Marshall if--if there were any--if there was any--were there any drugs in the vehicle, and he took two or three seconds--no, wait a minute, I guess--I first asked him if he was carrying any weapons and he told me no. I then asked him if he was carrying any--if there was any alcohol in the vehicle, he said that he did not drink. I recall both answers were quite quick. And then

I asked him if there were any drugs in the vehicle, he paused for, you know, probably two or three seconds, and then told me no. I then asked him if it would be okay if I looked in the vehicle, search the vehicle, and he said go ahead.

Q. Now, did you ask if you could look in the vehicle, or did you ask if you could search the vehicle.

A. Well, according to this [his report], I said--I asked if I could look in the vehicle.

Q. So, it was "look in the vehicle"?

You didn't ask if you could open anything inside the vehicle or anything else, did you?

A. No. I just asked if I could look in the vehicle.

Q. And what happened then?

A. Mr. Marshall just told me, you know, he said go right ahead. He got out, gathered up his papers and we walked up to the front of the vehicle, and he had to open the passenger door, as I recall.

....

Q. And how did you get in the trunk?

A. I asked him, I said--asked him if he had the key to the trunk and he says yes, and I says--and I asked him if he's [sic] open it, which he did, he tried. He was extremely nervous at the time. I--

Q. So did you open the trunk?

A. No, sir, I did not. He--he could not--there was a little latch over the key hole. He was shaking so hard, he couldn't even hold the latch open, so I held the latch up for him so he could insert the key.

Q. And what was inside the trunk?

A. There were four suitcases.

Q. Did you ask if you could look in those suitcases?

A. Uh huh (affirmative). First of all, I asked him what was in the suitcases, and he told me, right quickly, clothes. Then when I looked at him again, he told me that he didn't know where they came from, they must have been in there when he rented the car.

Q. At that point, you opened the suitcases?

A. Couldn't open them, they were padlocked shut.

Q. So, you broke the lock?

A. No. I--one part could zip open a little ways, and I opened it--or unzipped it, far enough where I could see the contents of one bag.

Q. And you didn't ask permission to look inside the suitcases, did you?

A. I don't recall if I asked specifically to look inside those, no.

Q. So, to look inside the suitcases, you were based on the permission to look inside the vehicle; is that correct?

A. Well, I retract that. His first response was clothes when I asked him what it was, and then I asked him if I could look in the suitcases, and he told me, well, they're not mine, they must have been in the trunk when I rented the car. So, yes, he did say they weren't his.

Q. If they weren't his, how come you charged him with the crime?

A. He told me they weren't his, that's what he said. He said go--when I asked--

Q. But you didn't ever get permission from him to search the suitcases, did you? And at that point, you had them out of the vehicle; is that correct?

A. Uh huh (affirmative). I took one out.

Q. And it was locked?

A. Uh huh (affirmative).

Q. And you had to work around the lock to look inside?

A. Well, there was a little play in it, enough where you could see inside.

Q. And to look inside the suitcase, you were basing the permission to look inside the vehicle?

A. Yes.

Mr. Marshall contends that Trooper Avery's request to "look in the car" did not constitute a request to search the vehicle. We disagree. Mr. Marshall gave his consent, although not precisely phrased as consent "to search," then stood by while the trooper searched the passenger compartment of the vehicle. "Failure to object to the continuation of the search under these circumstances may be considered an indication that the search was within the scope of consent." *United States v. Espinoza*, 782 F.2d 888, 892 (10th Cir. 1986); *see also United States v. Corral-Corral*, 702 F. Supp. 1539, 1544 (D. Wyo. 1988).

Because of our holding, we need not reach the more difficult issue of whether Mr. Marshall's opening the trunk constituted implied consent to search the trunk under the totality of the circumstances presented. *See United States v. Almand*, 565 F.2d 927, 930 (5th Cir.), *cert. denied*, 439 U.S. 824 (1978) (voluntary consent found where defendant silently reached into his pocket, removed key,

then unlocked and opened camper door).

Mr. Marshall did not consent to Trooper Avery's search of the locked suitcases. The state does not argue that Mr. Marshall's consent to search the trunk should be construed to include locked suitcases found in the trunk.[8] Rather, the state argues that his disclaimer of ownership of the suitcases should be construed to validate the search. We agree that Mr. Marshall made a somewhat ambiguous disclaimer of ownership of the four suitcases found in the trunk of the vehicle, but he did not give his consent to their search.[9] The state has not referred us to any case where a disclaimer of ownership has been held to be a voluntary consent to search. The cases approving the subsequent search of a suitcase after disclaimer of ownership have all turned on the threshold issue of standing or abandonment, not consent.[10] We refuse to rely on this authority as it would allow the state to circumvent the teachings of *State v. Schlosser*, 774 P.2d 1132 (Utah 1989), and allow the state to raise the issue of fourth amendment standing for the first time on appeal by way of the back door.

In summary, we reverse the trial court's denial of the motion to suppress as Mr. Marshall did not consent-in-fact[11] to the search *of the locked suitcases found in the trunk of* his vehicle.

Judith M. Billings, Judge

WE CONCUR:
Richard C. Davidson, Judge
Norman H. Jackson, Judge

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1. The state relies upon the following testimony from the preliminary hearing:

> Q. And what was inside the trunk?
> A. There were four suitcases.
> Q. Did you ask if you could look in those suitcases?
> A. Uh huh (affirmative). First of all, I asked him what was in the suitcases, and he told me, right quickly, clothes. Then when I looked at him again, he told me that he didn't know where they came from, they must have been in there when he rented the car.

2. Our conclusion may seem at odds with the general rule that we "may affirm the trial court's decision on any proper grounds, even though the trial court assigned another reason for its ruling." *State v. Bryan*, 709 P.2d 257, 260 (Utah 1985). We agree with the general rule, but find the issue of fourth amendment standing to be unique. Fourth amendment standing involves more than simply applying another legal principle to sustain an evidentiary ruling. The failure to raise a fourth amendment standing claim is more analogous to the failure to plead and try an affirmative defense or an attempt to assert a new theory of recovery for the first time on appeal. *See Bangerter v. Poulton*, 663 P.2d 100, 102 (Utah 1983) ("It is axiomatic that defenses and claims not raised by the parties in the trial cannot be considered for the first time on appeal."); *State v. Johnson*, 771 P.2d 326, 327-28 (Utah Ct. App. 1989) (defendant cannot raise constitutional issues for first time on appeal); *Sampson v. Richins*, 770 P.2d 998, 1005 (Utah Ct. App. 1989) (defendant cannot raise affirmative defense for first time on appeal); *James v. Preston*, 746 P.2d 799, 801 (Utah Ct. App. 1987) ("matters not raised in the pleadings nor put in issue at the trial may not be raised for the first time on appeal."); *Conder v. A.L. Williams & Assocs., Inc.*, 739 P.2d 634, 637 n.2 (Utah Ct. App. 1987) (matters not presented to trial court prior to summary judgment cannot be raised for first time on appeal). The state asserts fourth amendment standing to validate what otherwise would be an unconstitutional search. The defendant must have an opportunity to factually meet this defense to an unconstitutional search.

Furthermore, although the Utah Supreme Court applied the waiver of fourth amendment standing rule to uphold the trial court's granting of a motion to suppress in *Schlosser*, the court relied on *State v. Goodman*, 42 Wash. App. 331, 711 P.2d 1057 (1985), which held the state could not raise the issue of standing for the first time on appeal to provide an alternative ground for sustaining the trial court's denial of a motion to suppress. *Id.* at 1060.

3. While the warning citation does not specify which provision of the Utah Code Mr. Marshall violated, the state asserts that his conduct was in violation of Utah Code Ann. §41-6-117(1) (1988) which, with our emphasis, provides:

> *It is a misdemeanor for any person to* drive or move or for the owner to cause or knowingly permit to be driven or moved on any highway any vehicle or combination of vehicles which is in such unsafe condition as to endanger any person, *or which does not contain those parts or is not at all times equipped with lamps and other equipment in proper condition and adjustment* ....

4. In *Delaware v. Prouse*, 440 U.S. 648, 660-61 (1979), the United States Supreme Court stated that an officer has a duty in the interest of highway safety to stop vehicles for safety reasons. "Many violations of minimum vehicle-safety requirements are observable, and something can be done about them by the observing officer, directly and immediately." *Id.* at 660. The Court inferred that as long as an officer suspects the driver is violating "any one of the multitude of applicable traffic and equipment regulations," the police officer may legally stop the vehicle. Id. at 661. *See Townsel v. State*, 763 P.2d 1353, 1355 (Alaska Ct. App. 1988) (court held stop justified when vehicle's headlight was out, a tail light was broken, the license plate and windows were obscured, and speeding); *State v. Puig*, 112 Ariz. 519, 544 P.2d 201, 202 (1975) (suspicion of defective turn signals justified stop); *State v. Fuller*, 556 A.2d 224, 224 (Me. 1989) (stop justified when blinking headlights led officer to stop vehicle for safety reasons).

5. We do not analyze this issue under article I, section 14 of the Utah Constitution as the state constitutional issue was not sufficiently particularized below nor is a reasoned analysis provided on appeal as to why our analysis should be different under Utah's constitution. *See State v. Johnson*, 771 P.2d 326, 327-28 (Utah Ct. App. 1989).

6. *Dunaway v. New York*, 442 U.S. 200 (1979) (defendant taken from neighbor's home, transported unwillingly to police station, was subjected to custodial interrogation for one hour until he made incriminating statements); *Florida v. Royer*, 460 U.S. 491 (1983) (defendant stopped at airport, his luggage seized, then he was taken to a small room where he was questioned and his luggage inspected); *United States v. Place*, 462 U.S. 696 (1983) (defendant stopped at airport, his luggage seized for 90 minutes to take it to narcotics detection dog for "sniff test," police knew of arrival time and should have had the dog on hand).

7. The state does not argue that Trooper Avery had probable cause to search either the car or the suitcases. We, therefore, need not deal with the troublesome issue of whether probable cause to search an automobile is sufficient under the automobile exception to search a locked suitcase found in the trunk of a car. *See, e.g., United States v. Ross*, 456 U.S. 798 (1982) (if probable cause exists, police can search closed containers found in vehicle); *Arkansas v. Sanders*, 442 U.S. 753 (1979) (warrantless search of a suitcase found in the trunk of a taxi invalid); *United States v. Chadwick*, 433 U.S. 1 (1977) (warrantless search of a footlocker found in the trunk of a vehicle invalid); *State v. Hygh*, 711 P.2d 264, 272 n.1 (Utah 1985) (Zimmerman, J., concurring separately) (criticizing the Ross holding).

8. *See State v. Cole*, 31 Wash. App. 501, 643 P.2d 675 (1982), where the defendant gave permission to search his hatchback vehicle, but did not give consent to search the suitcases found in the vehicle. *Id.* at 678. The court held that the consent to search the vehicle did not encompass the suitcases. Id.

9. Trooper Avery believed that Mr. Marshall's denial of ownership of the suitcases validated the search. He did what our case law has instructed and the defect in the search was not as a result of his actions, but rather those of the prosecutor in failing to properly raise the issue of standing.

10. *See United States v. Williams*, 538 F.2d 549, 550-51 (4th Cir. 1976) (court found abandonment and held cases properly seized when defendant denied ownership of certain cases found in his motel room and allowed the search of the cases); *United States v. Colbert*, 474 F.2d 174, 177 (5th Cir. 1973) (court found abandonment when defendants disclaimed ownership of suitcases and began to walk away from them).

11. We do not reach the issue of the voluntariness of Mr. Marshall's consent to the search of the car, the trunk, or the suitcases because we find there was no consent-in-fact to the search of the suitcases. *See, e.g., Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (analysis of voluntariness of consent); *State v. Sierra*, 754 P.2d 972, 980-81 (Utah Ct. App. 1988) (state did not sustain its burden to prove defendant's consent was voluntary).

Cite as
124 Utah Adv. Rep. 66

IN THE UTAH COURT OF APPEALS

George "Nick" KIRK,
Plaintiff and Appellant,
v.
STATE OF UTAH and its subdivision, the Department of Corrections,
Defendant and Respondent.

No. 890276-CA
FILED: December 27, 1989

Fourth District, Utah County
Honorable Boyd L. Park

ATTORNEYS:

Paul N. Cotro-Manes, Salt Lake City, for Appellant

R. Paul Van Dam, Allan L. Larson, Dennis C. Ferguson, and Christopher C. Fuller, Salt Lake City, for Respondent

Before Judges Bench, Jackson, and Bullock.[1]

OPINION

BENCH, Judge:

Plaintiff George "Nick" Kirk appeals an order granting the State's motion to dismiss his negligence action. We affirm.

Plaintiff's complaint against the State stems from an injury he received while working as an unarmed bailiff at the Metropolitan Hall of Justice. On April 2, 1985, Ronnie Lee Gardner, an inmate at the Utah State Prison, was escorted by two corrections officers to the Hall of Justice to attend court proceedings. In the basement of the building, a female accomplice passed a loaded handgun to Gardner, who then exchanged gunfire with the officers. When plaintiff came down a stairwell to investigate the commotion, Gardner shot and seriously wounded him. *See State v. Gardner*, 101 Utah Adv. Rep. 3 (1989).

The State moved to dismiss plaintiff's complaint under the provisions of the Utah Governmental Immunity Act, Utah Code Ann. §§63-30-1 to-38 (1989). The State contended that it was immune from suit because plaintiff's injury resulted from the exercise of a governmental function. *See* Utah Code Ann. §63-30-3 (1989). The State further argued that even if the injury resulted from the negligent acts or omissions of state employees, there is no waiver of immunity if the injury *"arises out of the incarceration of any person* in any state prison ... or other place of legal confinement." *See* Utah Code Ann. §63-30-10(1)(j) (1989) (emphasis added).

The district court granted the State's motion to dismiss, finding that the State's

ADDENDUM C

The following amendments to the *United States Constitution* are determinative of this matter:

Amendment IV

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probably cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The following provisions of the *Constitution of the State of Utah* are determinative of this appeal:

Article 1, Section 1

All men have the inherent and unalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; to worship according to the dictates of their consciences; to assemble peaceable, protest against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right.

Article 1, Section 14

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

Article 1, Section 24

All laws of a general nature shall have uniform operation.

Article 1, Section 27

Frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government.

The following statutes of the State of Utah are determinative of this appeal:

Section 41-6-55

Section 41-6-117

Section 41-6-121.10

Section 41-6-162

Section 41-6-166

Section 41-6-167

Section 76-10-803

Section 77-7-15

Section 77-35-12

The following regulation and rules of the *Utah Department of Public Safety* are determinative of this appeal:

Utah Vehicle Safety Inspection Rule 735-100

Rules and Regulations and Instructions for Official Vehicle Inspection Stations.